LIM KIM HUA

v.

HO CHUI LAN & ANOR.

HIGH COURT SABAH & SARAWAK, SIBU
TUAN STEVE SHIM LIP KIONG J
[CIVIL SUIT NO. 22 OF 1987]
27 JUNE 1995

LAND LAW: *Transfer of property - Plaintiff seeking declaration that transfers null and void - Whether transfers obtained by fraud or dishonesty - Transferor old, illiterate and dependant on first defendant - Whether first defendant had exerted undue influence on transferor - Property bequeathed to grandchildren in will - Whether there was deliberate concealment to overreach beneficiaries interests - Whether memorandum of transfers null and void - Whether entries of the transfers in the land register should be cancelled.*

The plaintiff was the registered proprietress of a piece of land on which stood a shophouse. On 10 March 1983 the plaintiff executed a will devising and bequeathing the shophouse to four of her grandchildren including the second defendant. On 3 May 1984 the plaintiff executed a memorandum of transfer (P4) transferring her one-half share of the shophouse to the second defendant and on 30 December 1985 she executed another memorandum of transfer (P1) transferring her remaining half-share of the shophouse to the first defendant (the mother of the second defendant) and one Ho Chui Hiong at one-quarter share each.

The plaintiff sought a declaration that the two memoranda of transfer are null and void and relied on the ground of fraud or dishonesty and undue influence on the part of the defendants. The plaintiff alleged that the second defendant had cheated her into executing P4 thereby transferring to him her one-half share of the shophouse. The second defendant on the other hand said that the land clerk at the district office had prepared P4 and explained the contents and the purpose of the transfer to the plaintiff and that she had understood what was explained to her and then thumbprinted the document.

As for P1 the plaintiff argued that there was fraud or dishonesty against the beneficiaries. The plaintiff contended that although the first defendant had custody and possession of the 1983 will, she had consciously kept quiet about the matter and by so doing had deliberately and intentionally overreached the interests of the beneficiaries in question. The plaintiff further attacked the validity of P1 on the grounds of fraud or dishonesty on the part of the first defendant and alleged undue influence exerted by the first defendant upon her.

Held:

[1] There is no evidence to indicate or suggest that the second defendant knew of the existence of the 1983 will at the time when P4 was executed. Therefore the question of whether there was any obligation on his part to disclose the said will to the plaintiff and/or the land clerk at the material time of the transfer would not arise. In any event, P4 was something of a restatement of the plaintiff's wish or desire, as can be seen from the contents of the 1983 will, to confer one-half share of the shophouse on the second defendant, although in effect she would have relinquished any proprietary interest therein during her lifetime. In the circumstances the plaintiff has not been able to establish, on a balance of probabilities, that there was fraud or dishonesty on the part of the second defendant which could be said to have the effect of vitiating the memorandum of transfer P4.

[2] The proposition by the plaintiff that the first defendant had deliberately and intentionally overreached the interests of the beneficiaries would tend to suggest that there was a duty on the part of the first defendant to inform the beneficiaries about the existence as well as the provisions of the 1983 will. Such a proposition is unacceptable. Given the secretive nature of a will whose contents should only be disclosed to the beneficiaries upon the death of the donor, the Court was not persuaded that there was any duty cast upon the first defendant to divulge or disclose the provisions of the 1983 will to any of the beneficiaries concerned.

[3] However fraud on the plaintiff has been established against the first defendant. There is evidence that the plaintiff was, at the material time, staying with the first defendant and that she was very much dependent on the first defendant in managing the affairs of the shophouse. There is also evidence to show that the plaintiff tended to be forgetful and was suffering from some form of senility. In the circumstances there was at least a moral duty on the part of the first defendant to lay all the facts and information before the plaintiff so that the latter could, within the limits of her mental capacity, determine what she wanted to do with her property. It was clear that the first defendant, being fully aware of the 1983 will and the subsequent transfer of one-half share of the shophouse to the second defendant, had deliberately withheld such information from the plaintiff, information which she was duty bound to disclose having regard to the close relationship between them and the confidence reposed in her by the plaintiff at all material times. This failure to disclose amounted to an active concealment of a material fact by the first defendant and was a clear manifestation of dishonest conduct. In the circumstances the validity of the memorandum of transfer, P1, has been impinged and it is null and void.

[4] There was sufficient evidence to show the existence of a special relationship between the plaintiff and the first defendant. The plaintiff was living with the first defendant who provided her with food and accommodation and the first defendant was entrusted by the plaintiff to manage the affairs of the shophouse. There can be no question that the plaintiff was very much dependent on the first defendant in both her physical and financial needs as she was getting on in age, had a poor memory and was illiterate. From these factors undue influence can reasonably be inferred and the first defendant's allegation that the plaintiff wanted to effect the transfer in a hurry and the contents were read and explained to her were not sufficient to rebut the inference of undue influence.

[5] The first defendant has not adduced evidence to show that all care and providence had been so taken by her that the plaintiff was put in possession of all material facts and information so as to enable her to decide fairly, fully and freely what she wanted to do with her property. By not drawing the plaintiff's attention to the 1983 will and by keeping silent as to the consequential effects upon the execution of P1, the first defendant had actively concealed the material facts and thus committed dishonesty against the plaintiff. On the evidence as a whole there was undue influence exerted by the first defendant upon the plaintiff as regards the execution of the memorandum of transfer P1 at all material times and in the circumstances P1 is therefore null and void.

[Orders accordingly]

Cases referred to:
Loi Hieng Chiong v. Kon Tek Shin [1983] 2 CLJ 70, [1983] 1 MLJ 31 ***(foll)***
Assets Co. Ltd. v. Mere Roihi & Ors. [1905] AC 176 ***(foll)***
Waimaiha Sawmill Co. Ltd. v. Waione Timber Co. Ltd. [1926] AC 101 ***(foll)***
Goh Hooi Yin v. Lim Teong Ghee & Ors. [1990] 2 CLJ 203, [1990] 3 MLJ 23 ***(foll)***
Mohamed Isa v. Haji Ibrahim [1968] 1 MLJ 186 ***(foll)***
Tate v. Williamson [1866] LR 55 ***(foll)***
Re Coomber [1911] 1 Ch. 723 ***(foll)***
Bainbrigge v. Browne [1881] 18 Ch. D 188 ***(foll)***
Zamet & Ors. v. Hyman & Anor. [1961] 3 All ER 933; [1961] 1 WLR 1442 ***(foll)***
Huguenin v. Baseley [1803-13] All ER 1 ***(foll)***

Legislation referred to:
Contracts Act 1950, ss. 16, 17

Other source referred to:
Anson's Law of Contract, 26th Edn., p. 245

For the plaintiff - Dr. Chew Peng Hui; M/s. Battenberg & Talma
For the defendants - David Tiong; M/s. Tiong Lim Wong & Co.

JUDGMENT

Steve Shim J:

The undisputed facts in this case can be briefly stated herein. Prior to 1984, the plaintiff, Lim Kim Hua, was the registered proprietress of that parcel of land together with the buildings thereon and appurtenances thereof situated at No. 13, Kanowit Bazaar, containing an area of 2,002sq ft; more or less, and described as Lot No 41980 Kanowit Town District (hereinafter referred to as 'the shophouse'). On 6 October 1980, the plaintiff executed a will devising and bequeathing the shophouse to four of her grandchildren, namely, Lim Kiew Yau (who is the second defendant in this case), Soon Choon Eng, Teo Hock Yiew and Teo Sian Siong in equal undivided shares of ¼ each. However, on 10 March 1983, the plaintiff executed another will revoking the 1980 will and devising and bequeathing the shophouse to the same four grandchildren but in different proportions as follows: 1/2 share to Lim Kiew Yau and 1/6 share each to Soon Choon Eng, Teo Hock Yiew and Teo Sian Siong. Then on 3 May 1984, she executed a memorandum of transfer transferring her 1/2 share of the shophouse to the second defendant, Lim Kiew Yau, and thereafter, on 30 December 1985, she executed another memorandum of transfer transferring her remaining 1/2 share of the shophouse to Ho Chui Lan (who is the first defendant in this case) and Ho Chui Hiong at 1/4 share each. On 24 January 1986, a tenancy agreement relating to the shophouse was effected between the plaintiff as the landlady and one Chia Kang Poh as the tenant.

In this suit, the plaintiff has sought for, *inter alia*, the following orders, namely, a declaration that the two memoranda of transfer (which have been produced and marked as exh. P4 and P1, respectively) are null and void and for the cancellation of the entries of the said transfers in the land register and costs. The main grounds relied on by the plaintiff are: (a) fraud or dishonesty; and (b) undue influence on the part of the defendants.

At the outset, I should state that the term 'fraud' has undergone both statutory as well as judicial definition. Under s. 17 of the Contracts Act 1950, fraud is defined as including any of the following acts committed by a party to a contract or with his connivance or by his agent, with intent to deceive another party thereto, or his agent, or to induce him to enter into the contract: (a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true; (b) the active concealment of a fact by one having knowledge or belief of the fact; (c) a promise made without any intention of performing it; (d) any other act fitted to deceive; and (e) any such act or omission as the law specially declares to be fraudulent. It is perhaps appropriate to note the explanation under the said section which states:

> Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak or unless his silence is, in itself, equivalent to speech.

In *Loi Hieng Chiong v. Kon Tek Shin* [1983] 1 MLJ 31, the Federal Court said *inter alia*, at p. 35:

> As regards the law, it has been said that the Courts have so far not ventured to lay down as a general proposition what amounts to fraud. It can only be determined from acts and circumstances of a particular case. It usually takes the form of a statement of what is false or a suppression of what is true. Where the relative position of the parties is such as raises the presumption of an unconscientious use of power arising out of the circumstances and conditions, the transaction cannot stand unless the person claiming benefit of it is able to repel the presumption by contrary evidence proving to have been in point of fact, fair, just and reasonable per Lord Selborne LC in *Earl of Aylesford v. Morris* [1873] 8 Ch. App 484; see also *Fry v. Lane* 40 Ch. D 312.

Therein, the Federal Court cited with approval the following passages in two English authorities, namely, *Assets Co. Ltd. v. Mere Roihi & Ors.* [1905] AC 176 wherein Lord Lindley said at p. 210:

> Fraud in these actions (ie. actions seeking to affect a registered title) means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud - an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud.

And in *Waimaiha Sawmill Co. Ltd. v. Waione Timber Co. Ltd.* [1962] AC 101 wherein Lord Buckmaster had reiterated:

> If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear.

On the question of the burden of proof where fraud has been alleged, it has been established that a high standard of proof is required. Here, I would adopt the position taken by the High Court in *Goh Hooi Yin v. Lim Teong Ghee & Ors.* [1990] 3 MLJ 23 wherein Edgar Joseph Jr. J (as he then was) said, *inter alia*, at p. 34:

> ... the onus of proof of fraud even in civil case in Malaysia is proof beyond reasonable doubt. It is not enough to show that the transfer had the effect of depriving the plaintiff of a known existing right. It must be demonstrated that the transfer was executed with the intention of cheating the plaintiff of such right. Furthermore, it is immaterial to decide whether there were other intentions

and equally immaterial to decide which was the dominant intention. The intention to cheat must be one which has a substantial influence on the decision to make the transfer.

And of course, the term 'proof beyond reasonable doubt' was briefly elaborated on in an earlier case of *Mohamed Isa v. Haji Ibrahim* [1968] 1 MLJ 186 which held that proof beyond reasonable doubt in civil cases did not mean proof had to reach certainty, although it must carry a high degree of probability. And what this meant was that the evidence adduced was such that the Court believed its existence or a prudent man considered its existence probable in the circumstances of the particular case; that if such proof extended only to a possibility but not in the least a probability, then it would fall short of proving beyond reasonable doubt. The appellate Court in that case held that the facts and circumstances pointed to the probability that there was fraud.

In the instant case, the plaintiff has alleged fraud on the part of the second defendant, Lim Kiew Yau, in respect of the memorandum of transfer dated 3 May 1984 (exh. P4), and she also alleges fraud by the first defendant, Ho Chui Lan in respect of the memorandum transfer dated 30 December 1985 (exh. P1). As regards exh. P4, it is the plaintiff's case that the second defendant had cheated her into executing the document thereby transferring to him her 1/2 share of the shophouse. This is reflected in the testimony of Ho Chui Hiong (PW2). The second defendant, in denying the allegation, has maintained, in effect, that on 3 May 1984, he and the plaintiff (who is his grandmother) had gone to the district office, Kanowit, where the plaintiff requested Mr. Lim Ko Jin (DW4), the land clerk, to prepare the memorandum of transfer relating to the plaintiff's 1/2 share of the shophouse and that after preparing the said document, Mr. Lim then read and explained the contents to her. The purpose of the transfer was also explained to her. According to the second defendant, the plaintiff understood what was explained to her and she then thumbprinted the document. Here, it is significant to note that although the plaintiff had, in 1980, made a will devising and bequeathing the shophouse to four of her grandchildren in equal shares of 1/4 each, she had subsequently in 1983 revoked this will and devised and bequeathed 1/2 of her share in the shophouse to the second defendant, Lim Kiew Yau, and the remaining 1/2 share to be divided equally between her three other grandchildren in 1/6 share each. There is no evidence to indicate or suggest that the second defendant knew of the existence of the 1983 will at the time when the memorandum of transfer (exh. P4) was executed. Hence, the question of whether there was any obligation on his part to disclose the said will to the plaintiff and or the land clerk at the material time of the transfer would not arise. In any event, it would appear that the document exh. P4 was something of a restatement of the plaintiff's wish or desire to confer 1/2 share of the shophouse on the second defendant, although of course in effect she would have relinquished any proprietary interest therein during her lifetime.

On the evidence as a whole, I do not think that the plaintiff has been able to establish, on a balance of probabilities, that there was fraud or dishonesty on the part of the second defendant which could be said to have the effect of vitiating the memorandum of transfer (exh. P4) executed by the plaintiff on 3 May 1984. This I so hold.

The plaintiff has attacked the validity of the memorandum of transfer (exh. P1) on the grounds: (a) that there was fraud or dishonesty on the part of the first defendant; and (b) that there was undue influence exerted by the first defendant upon the plaintiff. Under the said memorandum of transfer, the plaintiff had given all her remaining 1/2 share of the shophouse at No. 13, Kanowit Bazaar, to the first defendant and Ho Chui Hiong (PW2) in equal 1/4 share each.

On the issue of fraud or dishonesty, the plaintiff's case is twofold, one relating to the beneficiaries and the other to the plaintiff herself. The plaintiff has alleged that at the time of execution of the memorandum of transfer (exh. P1), there was fraud or dishonesty by the first defendant against the following persons, namely, Soon Choon Eng, Teo Hock Yiew and Teo Sian Siong, who were the beneficiaries under the 1983 will executed by the plaintiff. It is to be noted that these beneficiaries are the nephews of the first defendant. Here, the plaintiff has contended that I although the first defendant had, at all material times, custody and possession of the 1983 will and therefore, must be taken to have knowledge of the provisions therein, she had consciously kept quiet about the matter and that by so doing, she had deliberately and intentionally overreached the interests of the beneficiaries in question. Such a proposition would tend to suggest that there was perhaps a duty on the part of the first defendant to inform the said beneficiaries about the existence as well as the provisions of the 1983 will. With respect, I am inclined to disagree. None of the authorities cited by Dr. Chew can be said to support this contention. This is hardly surprising given the secretive nature of a will whose contents should, in the normal course of events, only be disclosed to the beneficiaries upon the death of the donor. In the premise, I am not persuaded that, in the circumstances of the case, there was any duty cast upon the first defendant to divulge or disclose the provisions of the 1983 will to any of the beneficiaries concerned.

Be that as it may, the situation as regards the plaintiff has to be examined in a different light. Here, there is evidence that the plaintiff was, at the material period between 1983 and 1986, staying with the first defendant and her family in Kanowit, and that she was very much dependent on the first defendant in managing the affairs of the shophouse at No. 13, Kanowit Bazaar. This related, for example, to the renting of the said shophouse. There is also evidence to show that the plaintiff tended to be forgetful and was suffering from some form of senility. This was quite apparent when she gave evidence in Court. I found her to be quite incapable of recalling simple matters and she drew a

complete blank when questioned about the circumstances in which the memorandum of transfer (exh. P1) was made. She was obviously prepared to leave questions on such matters to be answered by her daughter PW2, who she had called to testify on her behalf.

In the circumstances, I think there was a duty, at least a moral duty on the part of the first defendant to lay all the facts and information before the plaintiff so that the latter could, within the limits of her mental capacity, determine what she wanted to do with her property. In this case, the first defendant had, as I have stated, custody and possession of the 1983 will and was fully aware of the provisions therein at the time of the execution of the memorandum of transfer (exh. P1). She did not disclose the existence of this will nor its provisions to the plaintiff. Had the first defendant told the plaintiff that under the 1983 will, she had already provided the second defendant (who is the son of the first defendant) 1/2 share of the shophouse and that subsequently, in 1984, had in fact transferred the said 1/2 share to him by way of gift, it was quite conceivable that the plaintiff, realizing that the first defendant's family was amply provided for, might not have gone through with the execution of the memorandum of transfer (exh. P1). It seems clear that the first defendant, being fully aware of the 1983 will and the subsequent transfer of 1/2 share of the shophouse to her son, the second defendant, had deliberately withheld such vital information from the plaintiff, information which she was duty bound to disclose having regard to the close relationship between them and the trust and confidence reposed in her by the plaintiff at all material times. I find that there was active concealment of a material fact by the first defendant. This is a clear manifestation of dishonest conduct. In the circumstances, fraud has been established against the first defendant.

That being the case, the validity of the memorandum of transfer (exh. P1) has been impinged. It is null and void. This I so hold.

I now turn to the issue of undue influence. Here, the plaintiff has alleged that there was undue influence brought to bear by the first defendant on the plaintiff at the time memorandum of transfer (exh. P1) was executed. Now, what is undue influence? In a contractual situation, the term as provided in s. 16 of the Contracts Act 1950 stipulates:

> A contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

Undue influence may arise from the special relationship between parties. In this connection, *Anson's Law of Contract* (26th Edn.) at p. 245 cited a passage from *Tate v. Williamson* [1866] LR 55 wherein Lord Chelmsford said, *inter alia*:

> Whenever two persons stand in such a relationship that, while it continues, confidence is necessarily resposed by one and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage although the transaction would not have been impeached if no such confidential relationship had existed.

It has been held that not every fiduciary relationship raises a presumption of undue influence: see *Re Coomber* [1911] 1 Ch. 723 at p. 728. It must be one of a limited class which the Courts regard as suggesting undue influence and the relations which fall into this category are those between parent (or person in *loco parentis*) and child; see *Bainbrigge v. Browne* [1881] 18 Ch. D 188.

Having regard to the stated law, what then is the position in the instant case? In my view, although the plaintiff's own evidence provides little assistance, there is, I hold, sufficient evidence to show the existence of a special relationship between the plaintiff and the first defendant. It has not been disputed that, at the material time, the plaintiff was living with the first defendant who provided her with food and accommodation; that the first defendant was entrusted by the plaintiff to manage the affairs of the shophouse. There can be no question but that the plaintiff was very much dependent on the first defendant in both her physical and financial needs. This was so because she was getting on in age and had a poor memory. She was also illiterate. It was therefore against such factual circumstances that the memorandum of transfer (exh. P1) was executed by the plaintiff in favour of the first defendant and Ho Chui Hiong, PW2. From these factors, undue influence can reasonably be inferred unless the first defendant could show that she had not abused her position and that the said transfer was not brought about by undue influence. She must show, by strict proof, that the plaintiff, at the time of executing the said transfer, had fully understood, not just the nature of the transfer but its full significance and effect; see *Zamet & Ors. v. Hyman & Anor.* [1961] 3 All ER 933; [1961] 1 WLR 1442. I do not think that the first defendant has done so. She has merely alleged that the plaintiff wanted to effect the said transfer in a hurry and that the contents therein were read and explained to her. In my view, this would not be sufficient to rebut undue influence. As Lord Eldon said in *Huguenin v. Baseley* [1803-13] All ER 1 at p. 3:

> The question is not whether she knew what she was doing, had done or proposed to do, but how the intention was produced: whether all that care and providence was placed round her, as against those who advised her, which from their situation and relation with respect to her they were bound to exert on her behalf.

In the instant case, the first defendant has not adduced evidence to show that all care and providence had been so taken by her that the plaintiff was put in possession of all material facts and information so as to enable her to decide fairly, fully and freely what she wanted to do with her property. The plaintiff, placed in the position she was in relation to the first defendant, must be in full and complete appreciation of what she was doing. In my view, the first defendant should, in the circumstances of this case, not only have drawn the plaintiff's attention to the provisions of the 1983 will but also to the consequential effect or effects upon the execution of the memorandum of transfer (exh. P1). By keeping silent, she had actively concealed the material facts and thus committed dishonesty against the plaintiff.

On the evidence as a whole, I find that there was undue influence exerted by the first defendant upon the plaintiff as regards the execution of the memorandum of transfer (exh. P1) at all material times. In the circumstances I hold that the said memorandum of transfer is therefore null and void.

In summary therefore, the plaintiff has succeeded in her claims only against the first defendant, Ho Chui Lan, but not against the second defendant, Lim Kiew Yau. That being the position, in so far as her claims against the first defendant are concerned, I shall allow the following reliefs:

(1) that the memorandum of transfer dated 30 December 1985 registered under Kanowit Instrument No. L32/1986 be declared null and void,

(2) that the entry on the register relating to the said memorandum transfer under Kanowit Instrument No. L32/1986 be cancelled;

(3) that the issue document of title relating to the said memorandum of transfer under Kanowit Instrument No. L32/1986 be delivered up for cancellation; and

(4) that the plaintiff be given half the costs of this action to be taxed unless otherwise agreed.

Reported by Satish Nair